

SERVICE DATE – LATE RELEASE MAY 31, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36131

UTAH CENTRAL RAILWAY COMPANY, LLC V. KENCO LOGISTICS SERVICES, LLC;
KENCO GROUP; AND SPECIALIZED RAIL SERVICE, INC.—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision denies a petition to withdraw or amend admissions under 49 C.F.R. § 1114.27(b) filed by Utah Central Railway Company, LLC.

Decided: May 31, 2018

BACKGROUND

Upon referrals from the U.S. District Court for the District of Utah, Northern Division, Utah Central Railway Company, LLC (UCRY) filed this case with the Board on June 27, 2017. UCRY requests that the Board issue a declaratory order in its favor regarding unpaid demurrage charges assessed to the following shippers: Kenco Logistics Services, LLC, and Kenco Group (collectively, Kenco); and Specialized Rail Service, Inc. (SRS). On July 10, 2017, the Board granted a joint request for a 60-day extension of the deadline for replies to UCRY's petition. The Board also served a separate decision on November 27, 2017, directing the parties to confer on the possibility of mediation or arbitration. The parties did not agree to mediation or arbitration, and in a decision served December 14, 2017, the Board instituted a proceeding and adopted a procedural schedule, which included a period for discovery. On April 13, 2018, the Board adopted a revised procedural schedule.

On February 22, 2018, SRS and Kenco each served UCRY with a separate but similar "First Set of Requests for Production, Interrogatories and Requests for Admissions to Petitioner." (SRS Mot., Ex. 1; Kenco Mot., Ex. 1.) Both sets of requests asked UCRY to respond in writing within 15 days; thereafter, however, the parties agreed that responses would be due on March 20, 2018. (SRS Mot., Exs. 1 & 2; Kenco Mot., Exs. 1 & 2.)

On March 29 and 30, 2018, SRS and Kenco, respectively, filed motions to compel, asserting that to date they had received no responses to their discovery requests. The motions to compel specifically asked, among other things, that the requests for admissions be deemed admitted pursuant to operation of the Board's regulations at 49 C.F.R. § 1114.27(a).

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

The deadlines to reply to the SRS and Kenco motions were April 18, 2018, and April 19, 2018, respectively. See 49 C.F.R. § 1114.31(a)(1). UCRY did not reply to either motion, but it filed an opening statement on April 20, 2018. The opening statement did not refer to the pending motions to compel.

On May 1, 2018, the Board's Acting Director of the Office of Proceedings (Acting Director) granted, in part, the unopposed motions filed by SRS and Kenco. By operation of 49 C.F.R. § 1114.27(a), UCRY was deemed to have admitted the requests for admission served by SRS and Kenco on February 22, 2018. Further, UCRY was directed to respond to the shippers' interrogatories and requests for production of documents, to the extent it had not already done so.

Following that decision, also on May 1, 2018, UCRY filed what it called a "request to vacate" the Acting Director's decision, as it related to the admissions. In its filing, UCRY stated that it provided responses to requests for admissions, interrogatories, and requests for production to SRS beginning on April 16, 2018, and to Kenco beginning on April 17, 2018. (UCRY Mot. to Vacate 3.) Both SRS and Kenco filed replies to UCRY's request to vacate on May 3, 2018. The Board reviewed the request to vacate as an interlocutory appeal of the Acting Director's decision and denied it on May 15, 2018. In denying the request, the Board found no error of judgment by the Acting Director and concluded that no manifest injustice would occur by denying the appeal. The Board provided a deadline for UCRY to seek withdrawal or modification of its admissions pursuant to 49 C.F.R. § 1114.27(b).

On May 17, 2018, UCRY filed a petition to withdraw or amend admissions. Kenco and SRS filed a joint reply opposing the petition on May 18, 2018.

DISCUSSION AND CONCLUSIONS

Pursuant to 49 C.F.R. § 1114.27(b), the admissions at issue here are "conclusively established unless upon petition and a showing of good cause the Board enters an order permitting withdrawal or amendment of the admission."

UCRY asserts that good cause exists to withdraw or amend the admissions. UCRY explains that "[i]t took UCRY longer than anticipated to gather the information requested by Kenco and SRS" because necessary railroad employees were not available. (UCRY Pet. 3, May 17, 2018.) UCRY claims that it will be prejudiced because, among other things, the admissions "shift the burden of proof from Kenco/SRS to UCRY to show that for each individual car at issue the process in the tariff was followed." (Id. at 4.) In addition, UCRY claims that Kenco and SRS will not be prejudiced by a withdrawal. (Id. at 3.)

The unanticipated delay by UCRY in providing discovery to Kenco and SRS does not provide good cause to withdraw or amend the admissions. UCRY was served with the request

for admissions on February 22, 2018, and agreed upon March 20, 2018, as a deadline to serve discovery responses. (SRS Mot. 1 & Ex. 2; Kenco Mot. 1 & Ex. 2.) UCRY did not notify Kenco or SRS that its responses would be delayed, nor did it ask the shippers or the Board for an extension. Instead, UCRY did not even begin to produce discovery responses until almost four weeks late, and it never replied at all to the motions to compel filed by Kenco and SRS.²

UCRY's claim that the admissions would cause it undue prejudice also does not constitute good cause for withdrawal or amendment. UCRY claims that the admissions create undue prejudice because they would limit its arguments and "prevent the use of actual facts." (UCRY Pet. 4, May 17, 2018.) However, the fact that the admissions are unfavorable to UCRY's position does not, by itself, constitute good cause in this case.³ The problem UCRY identifies is merely the intended operation of 49 C.F.R. § 1114.27(a), which here was triggered due to UCRY's inattentiveness to its discovery obligations and the Board's regulations. If the Board were to grant UCRY's petition simply because the admissions are unfavorable to UCRY, the rules at 49 C.F.R. § 1114.27(a) would be rendered meaningless.⁴

Because UCRY has not established good cause, its petition is denied.

It is ordered:

1. UCRY's petition to withdraw or amend admissions under 49 C.F.R. § 1114.27(b) is denied.
2. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.

² In any event, as Kenco and SRS have noted, UCRY has not provided any support for its claim that the delays were the result of necessary individuals being unavailable.

³ UCRY also claims that Kenco and SRS will not be prejudiced if UCRY is permitted to withdraw or amend the admissions. Although the parties appear to disagree as to the need to show a lack of prejudice to the party seeking the admissions, (see Respondents' Reply 9, May 18, 2018), the Board need not decide that, as Kenco and SRS have shown that they would be prejudiced by a withdrawal or amendment.

⁴ To the extent that UCRY has raised arguments about the impacts the admissions may have on substantive issues in this case, these issues can be addressed after the record is complete.